Supreme Court, U.S.
FILED
APR 12 1996
CLERK

(2)

No. 95-1467

In The

Supreme Court of the United States

October Term, 1995

THE PILLSBURY COMPANY, INC.,
Petitioner,

v.

THE PORT OF CORPUS CHRISTI AUTHORITY,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

David E. Black
Counsel of Record
Edward D. Burbach
George H. Lugrin, IV
GRIGGS & HARRISON, P.C.
1301 McKinney, Suite 3200
Houston, Texas 77010
Telephone: (713) 651-0600
Facsimile (713) 651-1944
Attorneys for Respondent

21 pp

QUESTION PRESENTED

1. Is The Port of Corpus Christi Authority, a single-state entity created and governed by the Texas Constitution and related Texas Legislation, entitled to sovereign immunity from suit in federal court under the Eleventh Amendment?

RULE 29.1 STATEMENT

No amendments are necessary to make the list of parties in Petitioner's petition for writ of certiorari currently accurate with respect to Respondent.

TABLE OF CONTENTS

Question Presented i

Rule 29.1 Statement ii

Table of Contents iii

Table of Authorities iv

Statement of Jurisdiction 2

Statement of the Case 2

Reasons to Deny the Writ 5

I. Implication of the State Treasury is Not the Sole Eleventh Amendment Requirement under Hess ... 5

II. The Fifth Circuit's Opinion is Not in Conflict with the Fourth Circuit or Other Circuits 6

III. *HESS* Did Not Alter Existing Fifth Circuit Precedent Respecting Single-State Entities 9

IV. The Fifth Circuit's Opinion is Consistent with *Hess* and *Lake Country Estates* 11

V. Smoke and Mirrors; Pillsbury's Real Complaint is Not with the Law But Wih the Application of the Facts to the Law 12

Conclusion 14

TABLE OF AUTHORITIES

FEDERAL CASES

Boatmens First National Bank of Kansas City v. KPERS,
57 F.3d 638 (8th Cir. 1995) 8

Christy v. Pennsylvania Turnpike Comn,
54 F.3d 1140 (3rd Cir. 1995) 8

Grant v. Niagara Frontier Transportation Authority, et. al, 1996 WL 107116
(W.D.N.Y. 1996) (not reported in F.Supp.) 8

Gray v. Laws,
31 F.3d 426 (4th Cir. 1995) 6, 7

Helvering v. Gerhardt,
304 U.S. 405 (1938) 13

Hess v. Port. Authority Trans-Hudson Corp.,
513 U.S. ___, 115 S. Ct. 394 (1994) ... 2, 5, 7, 8, 9, 10, 11

Jacintoport Corp. v. Gr. Baton Rouge Port Com'n,
762 F.2d 435 (5th Cir. 1985) 11

Kamani v. Port of Houston Authority,
702 F.2d 612 (5th Cir. 1983) 3,11

Lake Country Estates v. Tahoe Planning Agency,
440 U.S. 391 (1979) 9

Matter of Merchants Grain, Inc.,
59 F.3d 630 (7th Cir. 1995); 5,8

McCrea v. Harris County Houston Ship Channel Nav. District,
423 F.2d 605 (5th Cir. 1970) 3

McDonald v. Board of Mississippi Levee Commissioners,
832 F.2d 901 (5th Cir. 1987) 4,11

Mireles v. Waco,
502 U.S. 9 (1991) 13

Ristow v. South Carolina Ports Authority,
58 F.3d 1051 (4th Cir. 1995) 6,8

Seminole Tribe of Florida v. Florida et. al.,
__ U.S. __, 1996 WL 134309 (1996) 5

Thomas v. FAG Bearings Corp.,
50 F.3d 502 (8th Cir. 1995) 6,8

STATE CASES

Guillory v. Port of Houston Authority,
845 S.W.2d 812 (Tex. 1993) 3,4, 11

FEDERAL STATUTES

28 U.S.C. §1254(1) 2

STATE STATUTES

TEX. CONST. ART. XVI, § 59 3

TEX. WATER CODE ANN. § 62.101 (Vernon 1988) 3

TEX. WATER CODE ANN. §§ 62.102, 62.078 (Vernon 1988) . .4

TEX. CIV. PRAC & REM. CODE § 15.001 et seq.,
§ 101.102(a), § 101.023 11

No. 95-1467

In The

Supreme Court of the United States

October Term, 1995

THE PILLSBURY COMPANY, INC.,

Petitioner,

v.

THE PORT OF CORPUS CHRISTI AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, The Port of Corpus Christi Authority (the "Port"), presents this Brief in Opposition to the Petition for Writ of Certiorari by The Pillsbury Company, Inc. ("Pillsbury"). The Port requests that this Court deny Pillsbury's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner, The Pillsbury Company, Inc., requests that this Court overturn years of jurisprudence affording Texas Constitutional Ports immunity from suit in federal court pursuant to the Eleventh Amendment arm-of-the-state doctrine. In support of its Petition, Petitioner argues that the Fifth Circuit's arm-of-the-state doctrine is inconsistent with this Court's precedent and that a "conflict" exists between the Fourth and Fifth Circuit Courts. As explained herein, the Fifth Circuit's circuit arm-of-the-state doctrine is consistent with this Court's precedent and no inter-circuit conflict exists. The Petition should be denied.

This Court recently addressed the Eleventh Amendment arm-of-the-state doctrine in *Hess v. Port. Authority Trans-Hudson Corp.*, 513 U.S. ___, 115 S. Ct. 394 (1994). There is no novel or important reason why this Court should address this doctrine again.

A careful and fair reading of Pillsbury's Petition brings one to its central proposition. Either:

1. *Hess* stands for the proposition that protection of the state treasury is the only consideration when examining a single-state entity to determine Eleventh Amendment immunity

status (Pillsbury further argues that the Fourth Circuit has recognized this proposition while the Fifth Circuit has not); or,

2. Pillsbury is asking this Court to re-examine the factual basis for the Fifth Circuit's decision.

The Port respectfully suggests that this Court and the Fourth Circuit have made it abundantly clear that the former is incorrect. Rather, the Eleventh Amendment has a dual purpose in the single-state entity context; protection of the state treasury and protection of state dignity. Accordingly, Pillsbury must be asking this Court to re-examine the factual determinations made by the courts below. Such a unfavored reason for review by this Court is simply not justified in this case.

The Port is a wholly Texas created entity born of the Texas Constitution and operating pursuant to Texas Legislation. The Port's mission is to address the interests of the people of the State of Texas in the conservation and development of Texas' natural resources. TEX. CONST. ART. XVI, § 59; TEX. WATER CODE ANN. § 62.101 (Vernon 1988). The highest court in Texas has held that these single-state Texas Constitutional Ports were carefully structured by the State of Texas to perform entirely governmental functions and to enjoy the protection of the Eleventh Amendment. *Guillory v. Port of Houston Authority*, 845 S.W.2d 812 (Tex. 1993). The Fifth Circuit has long agreed. *McCrea v. Harris County Houston Ship Channel Nav. Dist.*, 427 F.2d 605 (5th Cir. 1970), *cert. denied*, 400 U.S. 927 (1970); *Kamani v. Port of*

Houston Authority, 702 F.2d 612 (5th Cir. 1983); *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901 (5th Cir. 1987).

Pillsbury misrepresents the factual findings of the courts below and ignores the unassailed proposition that the Port, as a Texas Constitutional Port, is factually and legally indistinguishable from the Port of Houston Authority which is entitled to Eleventh Amendment immunity. Judgments against the Port, while not paid directly from the state treasury, have practical consequences on the Texas state treasury. Ultimate control over the Port remains in the Texas Legislature through its continual amendment of the statutes by which the Texas Constitutional Ports operate. The Port is part of a network of Constitutional Ports which work in harmony to achieve a statewide purpose. The Texas Legislature expressly defines Texas Constitutional Ports as "governmental agencies" with the powers of government. TEX. WATER CODE ANN. §§62.102 (Vernon 1988). The Texas Supreme Court characterizes Texas Constitutional Ports as state "agencies" and recognizes that they are different from municipal ports because they are created for general statewide public purposes. *Guillory,* 845 S.W.2d at 814.

While the Port may sue and be sued in its own name in State court, the State of Texas has not consented to suit against the Port in its own name in federal court. TEX. WATER CODE ANN. §§ 62.102, 62.078 (Vernon 1988). The Port is entitled to the sovereign immunity of the State of Texas. Texas structured the Port to enjoy its Eleventh Amendment immunity. A

ruling that it is not entitled to immunity would be an affront to the dignity of the State of Texas.

REASONS TO DENY THE WRIT

I. IMPLICATION OF THE STATE TREASURY IS NOT THE SOLE ELEVENTH AMENDMENT REQUIREMENT UNDER *HESS*

Pillsbury argues that *Hess* stands for the proposition "that because the fundamental purpose of the Eleventh Amendment was to protect state treasuries, a governmental entity is not entitled to Eleventh Amendment immunity if a judgment against the entity would not affect the treasury." Petition, pg. 5 citing to *Hess*, 115 S.Ct. at 404-06. Such a statement is dead wrong. Not only can this be ascertained from a superficial reading of *Hess*, but this Court, on March 27, 1996, expressly stated:

> The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury,"... it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,"...

Seminole Tribe of Florida v. Florida et. al., __ U.S. __, 1996 WL 134309, *7 (1996) (quoting *Hess*, 115 S.Ct. at 400 and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) (internal quotations marks and citations omitted); *see also Matter of Merchants Grain, Inc.*, 59

F.3d 630 (7th Cir. 1995) (citing *Hess* and holding single-state entity entitled to Eleventh Amendment immunity despite the fact that it did not receive funds from state treasury); *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (8th Cir. 1995) (citing *Hess* and holding that coercive joinder of single-state entity undermines Missouri's dignity).

II. THE FIFTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH THE FOURTH CIRCUIT OR OTHER CIRCUITS

To support its contention that there is an inter-circuit conflict between the Fourth and Fifth Circuits, Pillsbury asserts: "The Fifth Circuit concluded that *Hess* applies only to bi-state entities" and "[t]his position directly conflicts with the well-reasoned conclusion of the Fourth Circuit in two recent decisions". Petition, pg. 11 *citing Gray v. Laws*, 31 F.3d 426, 431-33 (4th Cir. 1995) and *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051, 1053 n.5 (4th Cir. 1995), *cert. denied* 116 S.Ct. 514 (1995). Pillsbury's interpretation of these opinions is misplaced. There is simply no inter-circuit conflict between the Fourth and Fifth Circuits.

Gray recognized that "the same general principles identified in [*Hess*] must also apply..." in the single-state context. *Gray*, 51 F.3d at 432. These general principles are the Eleventh Amendment's twin reasons for being - - protection of the state treasury and protection of state dignity[1]. *Id.* (citing

---

[1] The *Gray* Court referred to state "dignity" as state "sovereignty" throughout the opinion.

Hess, 115 S.Ct. at 404). *Gray* also recognizes that *Hess* instructs that there is no state dignity concern in the bi-state context because of the nature of the entity itself. *Id.* at 433 (citing *Hess*, 115 S.Ct. at 401). Thus, one understands the reasons for the *Hess* presumption against immunity and the inquiry into the state treasury purpose when examining a bi-state entity.

Gray recognized that this is not the case in the single-state context. *Id.* at 433-34. Rather, analysis of single-state entities may require exploration of the Eleventh Amendment's other reason for being; protection of state dignity. *Id.* at 433. *Gray* realized that in the single-state context, if a judgment is to be paid directly from the state treasury, this fact alone "is largely, if not wholly, dispositive" of the issue. *Id.* The opposite is not true as suggested by Pillsbury. Where the state treasury will not be affected in the single-state context, *Hess* instructs that the general principle of protection of the state's dignity remains the Court's guide. *Id.* at 434.

Pillsbury avers that *Ristow* serves to reaffirm *Gray*. Petition, pg. 11. The Port agrees.[2] *Ristow* concluded that the South Carolina Port Authority ("S.C. Port") was entitled to Eleventh Amendment immunity because a judgment against it

---

[2] Even if *Ristow* somehow conflicts with *Gray*, *Gray* remains the law under *stare decisis*, as *Gray* pre-dates *Ristow* by some three months.

would affect the state treasury.[3] *Ristow*, 58 F.3d at 1054. Accordingly, *Ristow* was not required to perform the state dignity analysis because the state treasury factor was met.

Since the *Hess* opinion, other circuits have recognized the continued applicability of precedent as did the Fifth Circuit below. *Matter of Merchants Grain, Inc.*, 59 F.3d 630 (7th Cir. 1995) (citing *Hess* and holding single-state entity entitled to Eleventh Amendment immunity despite the fact that it did not receive funds from state treasury); *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (8th Cir. 1995) (citing *Hess* and holding that coercive joinder of single-state entity undermines Missouri's dignity); *Christy v. Pennsylvania Turnpike Com'n*, 54 F.3d 1140, 1145 (3rd Cir. 1995) (recognizing that *Hess* reiterated prior law and the continued viability of prior precedent in light of *Hess*); *Boatmen's First Nat. Bank of Kansas City v. KPERS*, 57 F.3rd 638, 641 n.8 (8th Cir. 1995) (noting that *Hess*' holding concerns a bi-state railway); *Grant v. Niagara Frontier Transportation Authority, et. al*, 1996 WL 107116, *2 n.1 (W.D.N Y. 1996) (not reported in F.Supp.) (distinguishing *Hess* as inapposite since it addresses bi-state entity).

Pillsbury ignores the fact that *Hess* cited approvingly to the precedents of the First, Third, Fifth, Sixth, Seventh and Eighth Circuits on Eleventh Amendment immunity. *Hess*, 115

---

[3]The Fourth Circuit made this determination despite the fact that there was no legal obligation, in the strictest sense, by the State of South Carolina to pay the debts of the S.C. Port. *Ristow*, 58 F.3d at 1054.

S.Ct. at 404-05. There is plainly no conflict between the Circuit Courts.

III. *HESS* DID NOT ALTER EXISTING FIFTH CIRCUIT PRECEDENT RESPECTING SINGLE-STATE ENTITIES

This Court's opinion in *Hess* essentially contributes to existing arm-of-the-state doctrine in three ways. First, it reiterates the long standing general principles that the Eleventh Amendment has a dual purpose: protection of a state's treasury against federal judgments and protection of a state's dignity against the coercive process of the federal tribunal. *Hess*, 115 S.Ct. at 400. Second, it creates a presumption against immunity for Compact Clause, or bi-state, entities unless there is "good reason" to believe that the States structured an agency to enjoy the State's immunity and Congress consented to such a structure. *Id.* at 402. Third, it declares that examination of a state's dignity interest is generally unnecessary when analyzing bi-state entities. Suit in federal court is not an affront to either of the states' dignity since the entity was born by agreement of two states with the consent of Congress. This leaves protection of the state treasury as the overriding factor in the bi-state context. *Id.* at 401.

Beyond these three areas, existing precedent in the circuits has not changed. This Court was careful to note that its *Hess* opinion was not only consistent with *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391 (1979), but also with the precedent existing in the First, Third, Fourth,

Fifth, Sixth, Seventh and Eighth Circuits. *Hess*, 115 S.Ct. at 404-05.

Pillsbury attempts to persuade this Court that should *Hess* be interpreted as not changing existing precedent relating to single-state entities, it would have only a very limited effect because of the large number of single-state entities as compared to the small number of bi-state entities.[4] Petition at pg. 6-7. The Port contends this is exactly the effect this Court desired. In fact, the first paragraph of the opinion states "[w]e granted certiorari to resolve an inter-circuit conflict" between the Second and Third Circuits regarding whether the Port Authority Trans-Hudson Corporation ("PATH") is entitled to Eleventh Amendment immunity. *Id.* at 397. PATH sat in both circuits and each circuit had reached an opposite conclusion regarding its immunity status using essentially the same legal analysis but reaching different factual conclusions. *Id.* at 399-400. A rare inter-circuit conflict, indeed. This is not the situation herein.

Pillsbury erroneously compares the Port to municipalities and counties. Pillsbury ignores the fact that the highest court in Texas has recently recognized that, unlike municipalities and counties, Texas Constitutional Ports, were structured by the State of Texas to perform entirely governmental functions, address statewide concerns and to

---

[4]Pillsbury vastly overstates the number of "potential Eleventh Amendment claimants" in Texas. See Pillsbury's Petition at p.6, fn. 2. Pillsbury's comparison of a Texas Constitutional Port, such as the Port, with school boards, municipalities, etc. is misplaced.

enjoy the protection of the Eleventh Amendment. *Guillory v. Port of Houston Authority*, 845 S.W.2d 812 (Tex. 1993). *Hess* does not alter this precedent.

IV. THE FIFTH CIRCUIT'S OPINION IS CONSISTENT WITH *HESS* AND *LAKE COUNTRY ESTATES*

The Fifth Circuit rested its holding that the Port is entitled to Eleventh Amendment immunity on *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983), and *Jacintoport Corp. v. Gr. Baton Rouge Port Com'n*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 478 U.S. 1057 (1986). [5] Petition, App. A at A4, fn. 5. Pillsbury apparently argues that this Fifth Circuit precedent was overruled by *Hess*. Petition, pgs. 5, 7. On the contrary, *Hess* implicitly and/or expressly approved of these decisions. *Hess* expressly approved of *Jacintoport* and *Lake Country Estates*. *Hess*, 115 S.Ct. at 404-05.

In *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901 (5th Cir. 1987), the Fifth Circuit expressly recognized *Jacintoport's* continued applicability and reaffirmed the precedental value of *Kamani*. *McDonald*, 832 F.2d at 906-08. *Jacintoport* was expressly based upon the principles set forth in *Lake Country Estates*. *Jacintoport*, 762 F.2d at 437. Accordingly, *Hess* does not overrule Fifth Circuit precedent, rather, it approves of it.

---

[5] In the opinion below, the Fifth Circuit explained that if it were to apply the *Jacintoport* analysis to the Port, in lieu of the clear *Kamani* precedent, the Port would satisfy the analysis and still be entitled to immunity. Petition, App. A at A4, fn. 5.

V. SMOKE AND MIRRORS; PILLSBURY'S REAL COMPLAINT IS NOT WITH THE LAW BUT WITH THE APPLICATION OF THE FACTS TO THE LAW

Since there is no inter-circuit conflict as explained above, the Fifth Circuit's decision does not pose any threat to interstate or international commerce, nor does it make litigants more likely to forum shop as Pillsbury suggests.[6] Petition, pgs. 13-15. Furthermore, an off-hand reference to a Federal Maritime Commission ("FMC") regulation and an untrue implication that the Port's tariffs (which must be approved by the FMC) exculpates it from liability for its own negligence in no way should justify the abrogation of the Eleventh Amendment to the U.S. Constitution. *Id.* The mountain labored and brought forth a mouse.

Pillsbury seemingly makes these assertions in an awkward attempt to make this case look more important in the eyes of this Court. However clothed, Pillsbury's real complaint appears to be a simple disagreement on facts. The Port belongs to a special class of Texas Constitutional entities that serve a

---

[6]In fact, it makes litigants less likely to forum shop. Ironically, it was Pillsbury which forum shopped in this case in an attempt to avoid the provisions of Texas law. In its Complaint, Pillsbury asserts breach of contract, breach of bailment, and negligence claims. The Texas legislature has consented to allow suit against the Port only in the state courts of Nueces County, Texas and has placed limits upon tort recoveries against the Port. TEX. CIV. PRAC. & REM. CODE § 15.001 et seq., § 101.102(a), § 101.023. Rather than bringing suit in the proper venue (or even in the federal district court sitting in Corpus Christi), Pillsbury filed suit over 200 miles to the north in Houston.

statewide purpose and were intentionally structured to enjoy Eleventh Amendment immunity. The Fifth Circuit, Texas Supreme Court, Texas Constitution and Texas Legislature all recognize the uniqueness of these entities as compared to others such as municipal ports, cities and counties. It seems that Pillsbury, a foreign corporation, is alone in its refusal to accept this structural sovereign choice of the State of Texas.[7] A ruling against the Port, as well as against all other Texas Constitutional Ports, in the face of such evidence would be an affront to the dignity of the State of Texas.

Pillsbury alternatively asks this Court to summarily reverse the Fifth Circuit. The exercise of such an extraordinary disposition is in no way warranted in this case. Fifth Circuit precedent remains intact after the *Hess* opinion. *See* Section IV *infra*. Moreover, the Fifth Circuit correctly applied the law to the facts and reached the just result. This case in no way presents the rare and exceptional circumstances which warrant summary reversal. Petition, pg. 17-18 (citing *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting)).

---

[7] *See Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("The genius of our government provides that, within the sphere of constitutional action, the people -- acting not through the courts but through their elected legislative representatives -- have the power to determine as conditions demand, what services and functions the public welfare requires.").

CONCLUSION

Pillsbury's petition for writ of certiorari should be denied.

Respectfully submitted,

David E. Black
Counsel of Record
Edward D. Burbach
George H. Lugrin, IV
GRIGGS & HARRISON, P.C.
1301 McKinney, Suite 3200
Houston, Texas 77010
Telephone: (713) 651-0600
Facsimile (713) 651-1944
Attorneys for Respondent

April 12, 1996